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BRIEF

UTAH
DC

IN THE COURT OF APPEALS

STATE OF UTAH

Docket No. 940717CA

PROVO CITY, Plaintiff and Appellee	:	Case No. 940717-CA
vs.	:	
FRANK LIFANG, Defendant and Appellant	:	Category No. 2

BRIEF OF PLAINTIFF-APPELLEE

APPEAL FROM A CONVICTION OF THE CRIME OF STALKING, A CLASS B MISDEMEANOR, IN THE FOURTH CIRCUIT COURT OF UTAH COUNTY, STATE OF UTAH, THE HONORABLE STEVEN L. HANSEN, JUDGE, PRESIDING

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COURT OF APPEALS

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JURISDICTION OF THE COURT OF APPEALS

The Utah Court of Appeals has jurisdictional authority pursuant to § 78-2(a)-3 (2) (d), Utah Code Annotated (1953, as amended).

STATEMENT OF THE ISSUE

Whether the Utah Stalking Statute, U.C.A. § 76-5-106.5 (Repl. 1995), is violative of the Due Process and Equal Protection Clauses of the United States Constitution and the Utah Constitution because it is vague and overbroad both facially and as applied to the defendant?

STATEMENT OF THE CASE

The defendant, Frank Lifang, was charged by the City of Provo with stalking, a class B misdemeanor, in violation of Utah Code Annotated § 76-5-106.5 (Repl. 1995) and Provo City Ordinance 9-76-5-106.5.

The Honorable Judge Stephen L. Hansen, Judge of the Fourth

Judicial District Court, Provo Department, State of Utah ordered a psychological evaluation of the Defendant. The Defendant was evaluated and found competent to stand trial.

The Defendant, by and through his counsel of record submitted a motion to dismiss, alleging that the Utah Stalking Statute, codified in U.C.A. § 76-5-106.5, was unconstitutionally vague and overbroad. The parties appeared before Judge Hansen on September 20, 1994 for a non-jury trial. Having heard the testimony of witnesses and arguments of counsel at trial, on October 11, 1994, the court issued a ruling which denied the Defendant's Motion to Dismiss, found the State had met its burden of proof, and found the Defendant guilty of the crime of stalking.

The Defendant, by and through counsel, filed a Notice of Appeal on November 15, 1994.

STATEMENT OF PROCEEDINGS

This is an appeal from the decision of the Honorable Judge Stephen L. Hansen, Fourth Circuit Court, Provo Department, State of Utah, rendered on October 11, 1994. The Defendant appeals both the trial court's denial of the Motion to Dismiss and its verdict of guilty.

STATEMENT OF THE FACTS

(All references are to the transcript of the trial as such transcript has been paginated by the certified shorthand

reporter.)

The Defendant, Mr. Frank Lifang, was charged with stalking Mrs. Kelly Roring subsequent to a confrontation instituted by the Defendant between himself and Mrs. Roring that took place at the Physician's Plaza, at the Utah Valley Regional Medical Center in Provo, Utah, on May 26, 1994 (page 51). The Defendant and Mrs. Roring became acquainted when they were both employed at the Provo Care Center in Provo, Utah in January of 1991 (page 17). After the Defendant's employment at the Provo Care Center terminated in April or May of 1991, he continued to maintain contact with Mrs. Roring, including calling her house (page 25), hiding in her yard (31), and leaving threatening notes on her car (page 39), which behavior culminated in a confrontation on May 26, 1994 (page 51).

Mr. and Mrs. Roring both testified that they had told the Defendant to stay away from Mrs. Roring (page 31, page 84). On April 14, 1994 the Defendant was served by Mrs. Roring's attorney with a copy of a Permanent Injunction enjoining the Defendant from bothering, harassing, or annoying Mr. or Mrs. Roring (page 127). The Defendant testified that he understood he was not supposed to have any contact with Mr. or Mrs. Roring, but initiated contact subsequent to the issuance of the injunction anyway (page 246-47).

On May 26, 1994 at 10:30 a.m., Mrs. Roring was crossing the parking lot at the Physicians Plaza when the Defendant approached

her from behind (page 53). The Defendant began swearing at Mrs. Roring, shouting, and throwing his arms about (page 53-54). At one point he told Mrs. Roring he was willing to die over this matter and he was going to take someone with him (page 55) the Defendant's words and actions were such that another employee in the parking lot was alarmed and notified hospital security (page 154).

The security officer that responded testified at trial that he interpreted the Defendant's conduct as threatening (page 165). A Provo police officer who also responded to the call testified that when he arrived the Defendant was agitated (page 176) and Mrs. Roring was very upset by the incident (page 177). The officer invited the Defendant to come down to the police station, the Defendant agreed, and the officer read him his Miranda rights (page 178-79). The officer took the Defendant's statement (page 180-83), during which the Defendant again made the statement that if he was going to die, he would take someone with him (page 182).

The officer interviewed the Rorings on the following day, obtained police reports from Orem regarding the Defendant, and spoke with the Defendant's probation officer (page 183). Based on his investigation, the officer charged the Defendant with stalking under Utah Code Annotated § 76-5-106.5.

SUMMARY OF THE ARGUMENT

The Utah Stalking Statute is not overbroad because it does

not make a substantial amount of constitutionally protected activity unlawful. The Appellant lacks the standing to mount a facial overbreadth challenge because he is not alleging the statute is overbroad as applied to his circumstances. He cannot make a facial overbreadth challenge under a First Amendment standing exception either because he has not shown that the statute implicates a substantial amount of First Amendment protected speech. Even if the Appellant has the standing for a facial overbreadth challenge, he has failed to carry his burden of proving that the overbreadth of the statute is real and substantial.

The Utah Stalking Statute is also not unconstitutionally vague, because it defines in terms an ordinary person would understand what conduct is prohibited by the statute. The Appellant cannot claim the statute is vague in relation to his own conduct because his conduct falls clearly within the legitimate application of the statute. The statute is also not facially vague because the statute has a specific intent requirement, a reasonable person standard, and concrete terms describing prohibited conduct.

Other states with stalking statutes have also heard challenges to those statute's constitutionality on grounds of overbreadth and vagueness. The vast majority of the states have upheld their statutes in the face of these challenges. Because Utah's Stalking Statute is neither overbroad nor vague, it does not violate the Due Process and Equal Protection Clauses of the

United States and Utah Constitutions.

ARGUMENT

I. UTAH CODE ANNOTATED § 76-5-106.5 HAS THREE COMPONENTS FOR A DEFENDANT TO BE HELD CRIMINALLY LIABLE FOR STALKING.

A. The Act Component

Utah Code Annotated § 76-5-106.5 (2)(a) says:

> A person is guilty of stalking who:
> (a) intentionally or knowingly engages in a course of conduct directed at a specific person. . . Id. at (2)(a).

To be held criminally liable under § 76-5-106.5, a defendant must have done something voluntary. By designating certain types of acts as stalking and requiring the state to prove that the defendant performed these acts, the legislature assures that the person being charged with stalking is not merely a bystander, but a criminal actor.

The legislature further identified acts which constitute stalking by including a definition of "course of conduct" in the statute. It defines "course of conduct" as:

> repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof directed at or toward a person. Id. at (1)(a).

This definition gives specific notice of what types of acts will make the defendant criminally culpable.

B. The Threat Component

The threat component of the Utah stalking statute is found within the definition of "course of conduct" cited above. Id. It is not an additional requirement to the act component, but is an alternative manner of fulfilling the "course of conduct" portion of the act component. To fulfill the act component, a defendant can either maintain a visual or physical proximity to the victim, or he can convey a threat to the victim. The threat component requires that a defendant communicate a verbal, written, implied by conduct, or combination threat to a specific person.

This requirement helps to "remove innocent and constitutionally protected activity from the scope of the statute." M. Katherine Boychuk, Are Stalking Laws Unconstitutionally Vague or Overbroad?, 88 Nw. U. L. Rev. 769, 779 (1994). Because a threat may subject a defendant to criminal liability under some other statutes, including it in the stalking statute helps to eliminate vagueness problems the statute might face. See e.g., U.C.A. § 76-5-102 (Repl. 1995) (criminal assault is a threat accompanied by a show of immediate force or violence), U.C.A. § 76-5-106 (Repl. 1995) (criminal harassment is communicating in writing a threat to commit any violent felony), U.C.A. § 76-5-107 (Repl. 1995) (penalty for threat against life or property).

C. The Intent Component

U.C.A. § 76-5-106.5 requires two types of intent: general and specific. General intent requires only that the "offender`s actions be voluntary." M. Katherine Boychuk, Are Stalking Laws Unconstitutionally Vague or Overbroad?, 88 Nw. U. L. Rev. 769, 779-80 (1994). The "intentionally" or "knowingly" language of the Utah statute indicates the general intent requirement. M. Katherine Boychuk, Are Stalking Laws Unconstitutionally Vague or Overbroad?, 88 Nw. U. L. Rev. 769, 779-80 (1994). The "intentionally" or "knowingly" language in the Utah statute comprises the general intent requirement. U.C.A. § 76-5-106.5 (2) (a) (Repl. 1995). By requiring the state to prove the defendant acted intentionally or knowingly, the legislature assures that the statute is not going to proscribe merely reckless or negligent conduct. To be criminally liable, the defendant has to voluntarily engage in the course of conduct prohibited by the stalking statute.

Specific intent is a "special mental element that goes beyond that required with respect to the offenders actions. . . . [it] requires that the offender have an additional culpable mental state." Boychuk, at 780. The Utah stalking statute's specific intent requirement is encompassed in the language requiring the defendant to engage in a course of conduct "directed at a specific person" with the knowledge that the specific person will "be placed in reasonable fear of bodily injury" or "will suffer emotional distress". U.C.A. § 76-5-106.5 (2) (b) (I)-(ii) (Repl. 1995). By requiring that the defendant's

actions be directed toward a specific person, with the intent that his actions cause a particular effect, the defendant can be presumed to be on notice that his actions constitute a crime.

II. U.C.A. § 76-5-106.5 IS NOT UNCONSTITUTIONALLY OVERBROAD BECAUSE IT DOES NOT MAKE UNLAWFUL A SUBSTANTIAL AMOUNT OF CONSTITUTIONALLY PROTECTED ACTIVITY.

A. Standard of Review

When an appeal rests solely on questions of law regarding the constitutionality of a statute, the appellate court gives "no particular deference to the rulings of the circuit and district courts on any of the points presented." Provo City Corp. v. Willden 768 P. 2d 455, 456 (Utah 1989). However, in deciding for itself the constitutionality of U.C.A. § 76-5-106.5, the appellate court must accord a strong deference to the statute because "legislative enactments are presumed to be constitutional." Greenwood v. City of North Salt Lake 817 P. 2d 816, 819 (Utah 1991). Because of this presumption of constitutionality, the appellant bears "the burden of demonstrating its unconstitutionality." Id.

B. Facial Overbreadth

An appellant challenging the constitutionality of a statute because of its overbreadth may allege either that the statute is overbroad in respect to the particular appellant's conduct, or that it is facially overbroad and chills the exercise of

constitutionally protected activities. The appellant in this case does not specifically allege that his conduct was constitutionally protected and that the Utah stalking statute unconstitutionally made unlawful that conduct. Instead, this appellant attempts to mount a facial overbreadth challenge to the statute, claiming that the statute "proscribes activities that are clearly constitutional under basic free speech rights." (Brief for Appellant at 10).

1. The defendant lacks standing for a facial overbreadth challenge.

To claim facial overbreadth, the appellant must first establish his standing to make the challenge. The traditional rule regarding standing in constitutional adjudication is described by the Supreme Court in Broadrick v. Oklahoma, 413 U.S. 601 (1973) when it states that:

> a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. Id. at 410.

The appellant is not arguing that the statute cannot be constitutionally applied to him. Instead he creates a hypothetical situation involving a service provider and a dissatisfied client where the statute might be unconstitutionally prohibitive of constitutionally protected activities. (Brief for Appellant at 10).

The appellant might have standing to adjudicate the potential claims of those not before the court if the overbreadth

challenge falls within one of the exceptions provided by the Supreme Court. This exception that the appellant is claiming is the First Amendment overbreadth doctrine. (Brief for Appellant at 7). This doctrine is based on the "sensitive nature of protected expression." New York v. Ferber, 458 U.S. 747, 768 (1982).

To properly invoke the First Amendment overbreadth doctrine, however, the defendant must first show that constitutionally protected First Amendment speech is involved. If a substantial amount of constitutionally protected conduct is not at issue, then the facial overbreadth challenge must fail. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982).

The Supreme Court said these types of overbreadth challenges are usually "entertained in cases involving statutes which, by their terms, seek to regulate 'only spoken words.'" Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) quoting Gooding v. Wilson 405 U.S. 518, 520 (1972). They also might be allowed where "rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations." Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

Neither of these First Amendment rights is implicated in the Utah Stalking Statute. The Utah statute does not regulate speech alone, but speech accompanied by conduct. The statute's definition includes "repeatedly conveying verbal or written threats," U.C.A. § 76-5-106.5 (1) (a), but the mere utterance of

these words is not enough to create liability under the statute. The words must be accompanied by conduct in the form of addressing them to a specific person with the intent or knowledge of causing that person to fear injury or suffer emotional distress. Id. at (2) (a)-(c).

Even if a defendant could be convicted of stalking by merely uttering the words, with no additional conduct involved, the types of words he would utter--threats--are not constitutionally protected speech. Threats have not been specifically identified as a category of speech not protected by the First Amendment. See, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words), Miller v. California, 413 U.S. 15 (1973) (obscenity), Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (libel), Brandenburg v. Ohio, 395 U.S. 444 (1969) (incitement). However, conveying a threat has been criminalized in other statutes, so a potential defendant is unlikely to feel the stalking statute significantly chills the exercise of speech which is otherwise criminal. See, e.g., U.C.A. § 76-5-102 (criminal assault), U.C.A. § 76-5-106 (criminal harassment), U.C.A. § 76-5-107 (threat against life or property).

The Utah Stalking Statute also does not burden innocent associations to the extent that a facial overbreadth challenge is warranted. The Appellant claims the statute could be construed to include innocent associations with people we regularly come in contact with. (Brief for Appellant at 10). However, the intent requirement of the Utah Stalking Statute would take these types

of innocent associations out of the purview of the statute. The Utah stalking statute requires both a specific and a general intent to commit the acts constituting the elements of the crime. See supra, I.C..

By requiring the course of conduct to be intentional and specifically directed at a particular person, someone who simply maintains a coincidental physical or visual proximity to a particular person, with no intent or knowledge to maintain that proximity or cause the person to fear injury or suffer emotional distress is not going to be criminally liable under U.C.A. § 76-5-106.5.

Since the Utah Stalking Statute does not significantly constrict First Amendment speech or association rights, the Appellant has no basis for mounting a facial overbreadth challenge. If the Appellant is not alleging that the statute is overbroad in its application to his circumstances, and the statute does not touch any First Amendment protected activities, then the Appellant has no standing to challenge the statute either for himself or for others not before the court.

2. If the Appellant has standing to make a facial overbreadth challenge to the statute, he has failed to meet his burden of demonstrating the statute's unconstitutionality.

Even if the court determines that some First Amendment protected activities are implicated in the operation of the Utah Stalking Statute, warranting a facial overbreadth challenge, the

Defendant has not met his significant burden of proving the statute is unconstitutionally overbroad.

The Supreme Court has held that the facial overbreadth doctrine is "strong medicine" and has been "employed by the Court sparingly and only as a last resort." Broadrick v. Oklahoma 413 U.S. 601, 613 (1973). The Appellant must prove that a "substantial" amount of constitutionally protected activity is being proscribed by the statute in order to overcome the statute's presumption of constitutionality. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982). In addition, the Superior Court of Connecticut in State v. Culmo, 642 A. 2d 90 (1993), where a defendant challenged the constitutionality of Connecticut's stalking statute, found that the state's interest in criminalizing stalking was a compelling interest. Id. at 101. In fact, the court said that "[p]roviding protection from stalking conduct is at the heart of the state's social contract with its citizens". Id. at 102.

In light of the state's interest in protecting its citizens and in not having every statute subjected to a constitutional challenge, the Broadrick Court established a threshold standard the appellant must meet in a facial overbreadth challenge. The Court said that:

> particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

In Broadrick, which involved a challenge to an Oklahoma law which prohibited state employees from certain political activities, the Supreme Court found that the "strong medicine" of a facial overbreadth invalidation was not warranted. The majority held that "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." Id. at 615-16.

To succeed in a facial overbreadth challenge the Appellant must prove that the Utah Stalking Statute is substantially overbroad and that no limiting construction can be placed on the statute. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). The Appellant has not met his substantial burden in failing to provide the court with evidence that the Utah Stalking Statute's overbreadth is real and substantial.

The Appellant has posed a hypothetical scenario in an attempt to meet that burden, but the scenario does not describe constitutionally protected conduct that would be criminally proscribed by the stalking statute. (Brief for Appellant at 10). The Appellant's scenario indicates that if a dissatisfied client of a service provider repeatedly complains about the quality of the service to the provider, knowing or intending the result to be emotional distress, then the client could be criminally liable for stalking. The Appellant is correct in his determination that under the statute this type of behavior would constitute stalking. However, the Appellant is incorrect in assuming that this behavior is constitutionally protected. A person who

repeatedly and intentionally or knowingly maintains a visual or physical proximity or communicates a threat, whether their reason for doing so is because of a relationship gone awry, or because they are dissatisfied with a good or service, does not have a constitutionally protected right to intentionally or knowingly cause another person to fear bodily injury or suffer emotional distress. While a dissatisfied client has the right to complain about goods or services, the Utah Stalking Statute requires that the conduct reach the level such that a reasonable person would fear bodily injury or suffer emotional distress before it constitutes a criminal action.

In addition to failing to present any credible evidence that the statute's overbreadth is real and substantial, the Appellant has also failed to prove that any limiting construction the court could put on the statute would be insufficient to cure its overbreadth.

The language of the Utah Stalking Statute itself provides the court with the limiting construction it needs to assure that the statute is applied only to the type of conduct the legislature found odious enough to criminalize and not to innocent, constitutionally protected conduct. The statute requires the fact finder to determine that a defendant's conduct in repeatedly maintaining a visual or physical proximity or communicating a threat to a specific person be such that a reasonable person would fear bodily injury or suffer emotional distress from the conduct. U.C.A. § 76-5-106.5 (2) (a) (I)-(ii)

(Repl. 1995). It is not enough for the fact finder to determine that the victim actually did suffer emotional distress or fear bodily injury; if a reasonable person would not have reached the same conclusions about the defendant's conduct, then the defendant committed no criminal act.

3. Other jurisdictions have upheld their stalking statutes in actions alleging facial unconstitutionality.

In City of Dayton v. Smith, 646 N.E. 2d 917 (Ohio Mun. 1994) the court denied the defendant's motion to dismiss the charges against him for stalking, stating that the defendant had not shown the Ohio stalking statute included a substantial amount of protected conduct. Id. at 920.

Likewise, in other, earlier cases in Florida, Virginia, and Connecticut, the courts have held those states' stalking statutes are not unconstitutionally overbroad. The Florida appellate court in Pallas v. State 636 So. 2d 1358 (1994) questioned the defendant's standing to raise an overbreadth challenge, but concluded that even if he did have standing, the statute was not overbroad in its use of the term "follows" as an element of the offense of stalking. Id. at 1364. The court said the term "follows" is "directed primarily at conduct, not First Amendment expression." Id. Therefore, the court found that this portion of the statute did not meet the Broadrick standard of real and substantial overbreadth which outweighed the statute's legitimate sweep. Id.

The Court of Appeals of Virginia also upheld that state's stalking statute against an overbreadth challenge in Woolfolk v. Commonwealth 447 S.E. 2d 530 (1994). In response to the defendant's claim that the Virginia Stalking Statute is broad enough to reach constitutionally protected activities, the court employed a narrowing construction to the statute. Id. at 852. The court decided to construe the statute as proscribing only conduct, with no legitimate purpose, engaged in with the intent to cause emotional distress by putting the victim in fear of death or bodily injury. Id. The court said such a narrowing construction is "not strained and prevents the possibility of overbreadth." Id.

The Superior Court of Connecticut in State v. Culmo, 642 A. 2d 90 (1993) denied the defendant standing to raise a facial overbreadth challenge because the court said he had not met the threshold requirement of proving that the statute regulated expression and not merely conduct. Id. at 103. Since the First Amendment protects speech and not conduct, which is subject to regulation by the state, when a statute proscribes intentional conduct and not speech, there is no basis for a facial invalidity challenge. Id.

More recently, in Culbreath v. State, 1995 WL 217573 (1995), the Alabama Court of Criminal Appeals evaluated its stalking statute in light of case law from other jurisdictions and other research, and found the statute not unconstitutionally overbroad. Id. at 6. The court noted that the Alabama statute's resembled

the California statute in requiring an intent, a threat, and an act.

III. THE UTAH STALKING STATUTE IS NOT UNCONSTITUTIONALLY VAGUE EITHER FACIALLY OR AS APPLIED TO THIS DEFENDANT BECAUSE IT CLEARLY DEFINES WHAT CONDUCT IS PROHIBITED.

After the court decides on the facial overbreadth challenge, if it fails, then the court should turn to the facial vagueness challenge to a statute. The Supreme Court in Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) says after the court turns to this facial vagueness challenge:

> assuming the enactment implicates no constitutionally protected conduct, [the court] should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. Id. at 494-95.

Because the Court requires standing to raise a vagueness challenge, the Court said it should first "examine the complainant's conduct before analyzing other hypothetical applications of the law." Id.

If this Court, in determining the validity of the Defendant's overbreadth challenge, decides that no First Amendment rights are implicated in the operation of the statute, then the Defendant must prove the statute is vague in all circumstances, including the Defendant's. Regardless of whether or not the court finds First Amendment rights at issue, it should consider first the statute as it applies to the Defendant's conduct before considering other, hypothetical circumstances.

A. The Utah Stalking Statute Is Not Impermissibly Vague as Applied to This Defendant

The Supreme Court defined the void-for-vagueness doctrine as requiring that a criminal statute "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited". Kolender v. Lawson 461 U.S. 352, 357 (1983). To prove that the Utah Stalking Statute is vague as applies to him, the Defendant would have to show that the statute did not alert him that his actions were criminally prohibited.

The Defendant in this case can make no such claim. His conduct is of the type clearly proscribed by the statute. The Defendant's conduct in visually and physically maintaining a close proximity to the victim was not only in violation of the Utah Stalking Statute, it was also in violation of a permanent injunction. The Defendant testified that he understood from the victim's attorney that he was to have no contact with the victim. (Transcript at 244). But even knowing this, he also testified that he intentionally initiated contact with the victim after he had knowledge that he was not to have any contact with her. (Transcript at 245).

Having admitted that he intentionally contacted the victim after he knew he was legally prohibited from doing so, the Defendant cannot claim that his conduct was innocent or that he did not know the conduct was prohibited. The language of the permanent injunction says the Defendant has agreed "to be permanently enjoined from bothering, harassing, annoying,

threatening or harming" the victim. (Judgment Granting Permanent Injunction at 2, see attached addendum). It also states that the Defendant agrees that he may be "restrained from coming in, on, or around the plaintiff's residence, place or employment or any place where plaintiff may be present." (Judgment Granting Permanent Injunction at 2, see attached addendum). The Defendant's actions in violating the Permanent Injunction are clearly proscribed by the stalking statute. Therefore, he cannot claim that the same conduct he knew was proscribed by the Injunction was not sufficiently described in the stalking statute to put him on notice that the conduct was proscribed by the statute.

To challenge a statute for vagueness, which does not implicate constitutionally protected conduct, the Defendant must prove that the statute is "impermissibly vague in all of its applications." Village of Hoffman Estates v. Flipside Hoffman Estates, Inc., 455 U.S. 489, 494 (1982). If the Defendant cannot prove that the statute is vague regarding his own conduct, that his conduct does not fall within the clear proscriptions of the statute, then his vagueness challenge must fail.

B. The Utah Stalking Statute Is Not Facially Vague

To avoid a vagueness challenge, a statute must be worded such that: (1) an ordinarily intelligent person has a reasonable opportunity to know what conduct is prohibited, and (2) it provides explicit standards so that the statute cannot be

applied arbitrarily or discriminatorily by law enforcement. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). The concern if statutes are worded too vaguely is that if the ordinary person is not sure what conduct will be criminal, their uncertainty might inhibit the exercise of First Amendment freedoms. Id. at 109.

In analyzing a statute for vagueness, however, the courts have acknowledged the strong presumption of validity of a statute and the dilemma of the legislature. The Florida District Court of Appeals describes this dilemma as, "to draft with narrow particularity is to risk nullification by easy evasion of the legislative purpose; to draft with great generality is to risk ensnarement of the innocent in a net designed for others." Pallas v. State, 636 So. 2d 1358, 1360 (1994). Because of this dilemma, the Florida court said the Supreme Court "will not ordinarily invalidate a statute because some marginal offenses may remain within the scope of a statute's language." Id. (quoting Laurence H. Tribe, American Constitutional Law § 12-31, at 1033-34 (2d ed. 1988).

The Utah Stalking Statute explains clearly, in terms the average person can understand what actions constitute the crime of stalking. The statute's requirement of a specific intent assures that the average person will not accidentally be criminally liable for seeing the same person on the street twice as the Appellant claims (Brief for Appellant at 12). If the state cannot prove beyond a reasonable doubt that the person has

a specific intent to keep the victim in physical or visual proximity and cause them to fear bodily injury or suffer emotional distress, then the person has not engaged in criminally proscribed conduct. The Connecticut Superior Court in State v. Culmo 642 A. 2d 90 (1993) said that the specific intent requirement in their state's stalking statute "significantly vitiates any claim that its purported vagueness could mislead a person of common intelligence into misunderstanding what is prohibited." Id. at 98.

The reasonable person standard of section 76-5-106.5 also eliminates any claims to vagueness. The state must prove that a reasonable person would, based on the defendant's course of conduct, fear bodily injury or suffer emotional distress. U.C.A. § 76-5-106.5 (2)(a) (I)-(ii) (Repl. 1995). This requirement eliminates the possibility of subjectivity in enforcement of the law because it is an objective standard. If an alleged victim reacts unreasonably to ordinary contact, then an ordinary person who maintains a visual or physical proximity with the alleged victim, even if that proximity is intentional, will not be criminally liable under the statute. The reasonable person standard assures that the individual's right to free association is not constrained by the statute.

The terms of the Utah Stalking Statute are also significantly concrete enough to withstand vagueness allegations. Other states' stalking statutes have been challenged for vagueness because of their use of terms such as "harass" or

"follow". See, e.g., Pallas v. State, 636 So. 2d 1358 (Fla. Dist. Ct. App. 1994), Culbreath v. State, 1995 WL 217573 (Ala. Crim. App. 1995). However, Utah's statute employs terms that are substantially more concrete. Rather than "follows", Utah uses the phrase "repeatedly maintaining a visual or physical proximity." U.C.A. § 76-5-106.5 (1) (a) (Repl. 1995). Rather than "harasses", Utah uses the phrase "intentionally or knowingly engages in a course of conduct". Id. at (2) (a).

The Utah Legislature, in drafting section 76-5-106.5 must have anticipated potential vagueness challenges. In anticipation of these challenges, the legislature included in the revised stalking statute a specific intent requirement, a reasonable person standard, and concrete language which the ordinary person would understand and would, therefore, be able to avoid so as not to be criminally liable for stalking.

C. Other States Have Upheld the Constitutionality of Their Stalking Statutes By Denying Facial Vagueness Challenges

Ohio, Alabama, Florida, Connecticut, Illinois, and Virginia have all recently upheld their state's stalking statutes in the face of constitutional challenges that the statutes are facially vague. See, City of Dayton v. Smith, 646 N.E. 2d 917 (Ohio Mun. 1994), Culbreath v. State, 1995 WL 217573 (Ala. Crim. App. 1995), Pallas v. State, 636 So. 2d 1358 (Fla. Dist. Ct. App. 1994), State v. Culmo, 642 A. 2d 90 (Conn. Super. Ct. 1993), People v.

Holt, 649 N.E. 2d 571 (Ill. App. Ct. 1995), Woolfolk v. Commonwealth, 447 S.E. 2d 530 (Va. Ct. App. 1994).

Many of the statutes withstanding these challenges contain language considerably less concrete and specific than that in the Utah Stalking Statute. In light of the singular failure of appellants in other states to prove their states' stalking statutes unconstitutional and the Utah Legislature's care in drafting the Utah statute, it seems apparent that the Utah statute can also withstand a vagueness challenge.

IV. THE UTAH STALKING STATUTE DOES NOT VIOLATE THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION AND THE UTAH CONSTITUTION, THEREFORE IT IS NOT INVALID FACIALLY NOR AS APPLIED TO THE DEFENDANT.

The Defendant has failed to meet his rather substantial burden of proving the Utah Stalking Statute is either unconstitutionally vague or overbroad in the face of its presumed constitutionality. Greenwood v. City of North Salt Lake, 817 P. 2d 816, 819 (Utah 1991). Having failed to meet this burden, the Defendant cannot allege that the statute violates the Due Process and Equal Protection Clauses of the United States and Utah Constitutions. The statute is neither unconstitutionally broad nor vague, therefore, the Defendant cannot allege that finding him criminally liable under the Utah Stalking Statute violates his equal protection or due process rights. The Defendant does not make any other showing that the statute was applied to him

discriminatorily or unconstitutionally, therefore his claim for a reversal of his conviction must fail.

CONCLUSION

The state has a significant interest in prohibiting its citizens from conduct that causes another citizen to fear for their physical safety or to suffer emotional distress. The Utah Stalking Statute was carefully drafted by the Utah Legislature to protect citizens from repeated, unwanted contact or threats from someone they fear might do them harm or causes them emotional distress.

The statute does not proscribe constitutionally protected activity nor coincidental contacts made during the course of everyday life. It requires the person charged with stalking to act repeatedly with purpose, knowledge, and intent. It requires the conduct to be directed at a particular person and that that person be reasonably fearful or distressed resulting from that conduct.

In this case the Appellant has asked this Court to find the statute he was convicted of violating unconstitutional because it is overbroad and vague. However, the Appellant has failed to overcome the statute's presumption of validity by showing its alleged overbreadth is "real and substantial" or that its vagueness is such that the statute is invalid in all its applications. He has also failed to prove that his conduct had a legitimate purpose and should not have been criminally proscribed

by the legitimate confines of the statute. This Court should, therefore, deny the challenges to the Stalking Statute's constitutionality and uphold the Appellant's conviction.

Respectfully submitted this 17 day of August, 1995.

Gary McGinn, Attorney
for
Vernon F. (Rick) Romney
Attorney for Appellee

MAILING CERTIFICATE

I hereby certified that I mailed, postage prepaid, four (4) copies of the foregoing Brief of Plaintiff-Appellee to Thomas H. Means, Attorney for Defendant-Appellant, at 43 East 200 North, PO Box "L", Provo, UT 84603-0200 this 21st day of August, 1995.

Gary McGinn
Provo City Attorney

ADDENDUM

Utah Code Annotated § 76-5-106.5 (Repl. 1995)

United States Constitution, Amendment XIV, Section 1

Constitution of Utah, Article I, Sections 7, 24

Judgment Granting Permanent Injunction, Kellie W. Roring v. Frank Lifang

Repl 1995

COLLATERAL REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d Extortion, Blackmail, and Threats § 57 et seq.

C.J.S. — 86 C.J.S. Threats & Unlawful Communications § 1.

76-5-106.5. Definitions — Crime of stalking.

(1) As used in this section:

(a) "Course of conduct" means repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof directed at or toward a person.

(b) "Immediate family" means a spouse, parent, child, sibling, or any other person who regularly resides in the household or who regularly resided in the household within the prior six months.

(c) "Repeatedly" means on two or more occasions.

(2) A person is guilty of stalking who:

(a) intentionally or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person:

(i) to fear bodily injury to himself or a member of his immediate family; or

(ii) to suffer emotional distress;

(b) has knowledge or should have knowledge that the specific person:

(i) will be placed in reasonable fear of bodily injury to himself or a member of his immediate family; or

(ii) will suffer emotional distress; and

(c) whose conduct:

(i) induces fear in the specific person of bodily injury to himself or a member of his immediate family; or

(ii) causes emotional distress in the specific person.

(3) Stalking is a class B misdemeanor.

(4) Stalking is a class A misdemeanor if the offender:

(a) has been previously convicted of an offense of stalking;

(b) has been convicted in another jurisdiction of an offense that is substantially similar to the offense of stalking; or

(c) has been previously convicted of any felony offense in Utah or of any crime in another jurisdiction which if committed in Utah would be a felony, in which the victim of the stalking was also a victim of the previous felony offense.

(5) Stalking is a felony of the third degree if the offender:

(a) has been previously convicted two or more times of the offense of stalking;

(b) has been convicted two or more times in another jurisdiction or jurisdictions of offenses that are substantially similar to the offense of stalking;

(c) has been convicted two or more times, in any combination, of offenses under Subsections (5)(a) and (b); or

(d) has been previously convicted two or more times of felony offenses in Utah or of crimes in another jurisdiction or jurisdictions which, if committed in Utah, would be felonies, in which the victim of the stalking was also a victim of the previous felony offenses.

History: C. 1953, 76-5-106.5, enacted by L. 1992, ch. 188, § 1; 1994, ch. 206, § 1.

Amendment Notes. — The 1994 amendment, effective May 2, 1994, rewrote Subsections (1) and (2) to such an extent that a detailed comparison is impracticable and added Subsections (4) and (5)

Effective Dates. — Laws 1992, ch 188 became effective on April 27, 1992, pursuant to Utah Const , Art VI, Sec 25

76-5-107. Threat against life or property — Penalty.

(1) A person commits a threat against life or property if he threatens to commit any offense involving violence with intent to:

(a) cause action of any nature by an official or volunteer agency organized to deal with emergencies;

(b) place a person in fear of imminent serious bodily injury; or

(c) prevent or interrupt the occupation of a building or room; place of assembly; place to which the public has access; or aircraft, automobile, or other form of transportation.

(2) A threat against life or property is a class B misdemeanor, except if the actor's intent is to prevent or interrupt the occupation of a building, a place to which the public has access, or a facility of public transportation operated by a common carrier, the offense is a third degree felony.

History: C. 1953, 76-5-107, enacted by L. 1973, ch. 196, § 76-5-107; 1988, ch. 38, § 1.

Cross-References. — Bus Passenger Safety Act, hijacking, bombing and other offenses, §§ 76-10-1501 to 76-10-1511.

COLLATERAL REFERENCES

Am. Jur. 2d. — 31A Am. Jur 2d Extortion, Blackmail, and Threats § 57 et seq

C.J.S. — 86 C J.S Threats & Unlawful Communications § 1.

A.L.R. — Validity and construction of terroristic threat statutes, 45 A.L.R.4th 949.

76-5-107.5. Prohibition of "hazing" — Definitions — Penalties.

(1) "Hazing" means any action or situation that, for the purpose of initiation, admission into, affiliation with, or as a condition for continued membership in any organization:

(a) recklessly or intentionally endangers the mental or physical health or safety of any person;

(b) willfully destroys or removes public or private property;

(c) involves any brutality of a physical nature such as whipping, beating, branding, forced calisthenics, or exposure to the elements;

(d) involves forced consumption of any food, liquor, drug, or other substance or any other forced physical activity that could adversely affect the physical health and safety of the individual;

(e) involves any activity that would subject the individual to extreme mental stress, such as sleep deprivation, forced exclusion from social contact, forced conduct that could result in extreme embarrassment, or any other forced activity that could adversely affect the mental health or dignity of the individual; or

(f) involves brutality toward or willful mistreatment of any animal.

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. Representatives—Power to reduce apportionment.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. Disqualification to hold office.

No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. Public debt not to be questioned—Debts of the Confederacy and claims not to be paid.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or

COLLATERAL REFERENCES

Utah Law Review. — The Mootness Question in Habeas Corpus Proceedings Where Petitioner Is Released Prior to Final Adjudication, 1969 Utah L. Rev. 265.

Habeas Corpus and the In-Service Conscientious Objector, 1969 Utah L. Rev. 328.

Post-Conviction Procedure Act: Limitation on Habeas Corpus?, 1969 Utah L. Rev. 595.

Am. Jur. 2d. — 39 Am. Jur. 2d Habeas Corpus §§ 5 to 7.

C.J.S. — 16A C.J.S. Constitutional Law § 472 et seq.; 39 C.J.S. Habeas Corpus § 5.

A.L.R. — Anticipatory relief in federal courts against state criminal prosecutions growing out of civil rights activities, 8 A.L.R.3d 301.

Key Numbers. — Constitutional Law ⇐ 83(1), 121 to 123.

Sec. 6. [Right to bear arms.]

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.

History: Const. 1896; L. 1984 (2nd S.S.), S.J.R. 3.

Compiler's Notes. — Laws 1983, Senate Joint Resolution No. 2, proposing to amend this section, was repealed by Senate Joint Resolution No. 3, Laws 1984 (2nd S.S.), § 2.

NOTES TO DECISIONS

ANALYSIS

Prospective application.
Regulation of right to bear arms.

Prospective application.

The amendment to this provision by Laws 1984 (2nd S.S.), Senate Joint Resolution No. 3 is to be given prospective application only. State v. Wacek, 703 P.2d 296 (Utah 1985).

Regulation of right to bear arms.

This section gives sufficient authority for the legislature to forbid the possession of dangerous weapons by those who are not citizens, or who have been convicted of crimes, or who are addicted to drugs, or who are mentally incompetent. State v. Beorchia, 530 P.2d 813 (Utah 1974).

COLLATERAL REFERENCES

Utah Law Review. — The Individual Right to Bear Arms: An Illusory Public Pacifier?, 1986 Utah L. Rev. 751.

Am. Jur. 2d. — 79 Am. Jur. 2d Weapons and Firearms § 4.

C.J.S. — 16A C.J.S. Constitutional Law § 511; 94 C.J.S. Weapons § 2.

A.L.R. — Gun control laws, validity and construction of, 28 A.L.R.3d 845.

Validity of statute proscribing possession or carrying of knife, 47 A.L.R.4th 651.

Key Numbers. — Constitutional Law ⇐ 82; Weapons ⇐ 1, 3, 6 et seq.

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

History: Const. 1896.

Cross-References. — Eminent domain generally, § 78-34-1 et seq.

project did not unconstitutionally grant benefits to private individuals; any benefits were strictly incidental to the public purpose of termination of urban blight. Tribe v. Salt Lake City Corp., 540 P.2d 499 (Utah 1975).

COLLATERAL REFERENCES

Am. Jur. 2d. — 36 Am. Jur. 2d Franchises §§ 9 to 23.

C.J.S. — 37 C.J.S. Franchises § 26.

Key Numbers. — Franchises ⇐ 11.

Sec. 24. [Uniform operation of laws.]

All laws of a general nature shall have uniform operation.

History: Const. 1896.

Cross-References. — Prohibition on private or special laws, Utah Const., Art. VI, Sec. 26.

NOTES TO DECISIONS

ANALYSIS

In general.

All laws shall operate uniformly wherever uniform laws can be enacted. State v. Holtgreve, 58 Utah 563, 200 P. 894, 26 A.L.R. 696 (1921).

Objects and purposes of law present touchstone for determining proper and improper classifications. State v. Mason, 94 Utah 501, 78 P.2d 920, 117 A.L.R. 330 (1938); State v. J.B. & R.E. Walker, Inc., 100 Utah 523, 116 P.2d 766 (1941).

One who assails legislative classification as arbitrary has burden of proving it to be such. State v. J.B. & R.E. Walker, Inc., 100 Utah 523, 116 P.2d 766 (1941).

Classification is never unreasonable or arbitrary in its inclusion or exclusion features so long as there is some basis for differentiation between classes or subject matters included, as compared to those excluded, provided differentiation bears reasonable relation to purposes of act. State v. J.B. & R.E. Walker, Inc., 100 Utah 523, 116 P.2d 766 (1941).

Before legislative enactment can be interfered with, court must be able to say that there is no fair reason for the law that would not require equally its extension to those which it leaves untouched. State v. J.B. & R.E. Walker, Inc., 100 Utah 523, 116 P.2d 766 (1941).

Only where some persons or transactions excluded from operation of law are, as to the subject matter of the law, in no differentiable class from those included in its operation, is the law discriminatory in the sense of being arbitrary and unconstitutional, and if reasonable basis to differentiate can be found, law must be held constitutional. State v. J.B. & R.E. Walker, Inc., 100 Utah 523, 116 P.2d 766 (1941).

Inability of legislature to make perfect classification does not render statute unconstitutional. State v. J.B. & R.E. Walker, Inc., 100 Utah 523, 116 P 2d 766 (1941).

In determining whether classification made by legislature is unconstitutional, discrimination is very essence of classification and is not objectionable unless founded upon unreasonable distinctions. Gronlund v. Salt Lake City, 113 Utah 284, 194 P.2d 464 (1948).

An act is never unconstitutional because of

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

KELLIE W. RORING, Plaintiff, vs. FRANK LIFANG, Defendant.	)	JUDGMENT GRANTING PERMANENT INJUNCTION Civil No. 940901302CV Judge Glenn K. Iwasaki

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Plaintiff in the above-entitled case, commenced an action in the above-entitled Court against the above-named defendant praying that defendant refrain from certain acts complained in the Complaint, and more particularly set forth herein.

A Temporary Restraining Order was given by order of this Court, made and entered on February 24, 1994. Because it was not possible to personally serve the defendant with the Temporary Restraining Order issued on said date, a Second Temporary Restraining Order was issued by the Court on March 4, 1994, and defendant was personally served with said Second Temporary Restraining Order as well as Summons and Complaint on March 7, 1994.

The defendant, having been informed of his right to seek legal representation through an attorney of his choice, has entered his appearance herein and waived the statutory time in

which to answer or otherwise respond to plaintiff's Complaint, and has consented that Judgment by Default may be entered against him at any time and without further notice to him.

Further, by his Appearance and Consent on file herein, the defendant has agreed that he will not bother, harass, annoy, threaten or harm the plaintiff at her place of residence, employment or any other place in person or by telephone, and he has agreed to not to come in, on, or around the plaintiff's residence, place of employment or any place where plaintiff may be present.

By his Appearance and Consent, defendant has agreed that he may be permanently enjoined from bothering, harassing, annoying, threatening or harming the plaintiff at her place of residence, employment or any other place in person or by telephone, and that he may be restrained from coming in, on, or around the plaintiff's residence, place of employment or any place where plaintiff may be present.

In additon, in his Appearance and Consent, the defendant has acknowledged that any appropriate peace officer shall render any necessary assistance to the plaintiff and that violations of any of the provisions of this permanent injunction may be deemed contemptuous and that the defendant could be punished accordingly.

Based upon the above and upon the Court's review of all the papers in this file, and the Court being fully advised in the premises, and because of the irreparable harm which plaintiff

could suffer if the defendant were to "get even" and carry out other threats he has made as set forth in the Complaint and plaintiff's Affidavit on file herein,

IT IS ORDERED, ADJUDGED and DECREED that the defendant, Frank Lifang, is hereby permanently enjoined and restrained from bothering, harassing, annoying, threatening or harming the plaintiff at her place of residence, employment or any other place in person or by telephone, and said defendant, Frank Lifang, is permanently enjoined from coming in, on, or around the plaintiff's residence, place of employment, or any place where plaintiff my be present; and in regard to this permanent injunction, any appropriate peace officer shall render any necessary assistance to the plaintiff.

Violation of any of the provisions mentioned herein may be deemed contemptuous and the defendant could be punished accordingly.

This Judgment granting permanent injunction shall be binding upon the parties to this action, their officers, agents, servants, employees and attorneys and upon those persons in active concert or participation with them who receive notice, in person or through counsel, or otherwise, of this Judgment Granting Permanent Injunction.

DATED this 9th day of March, 1994.

BY THE COURT:

District Court Judge

I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT, ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.
DATE:
DEPUTY COURT CLERK

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 16th day of March, 1994, a true and correct copy of the foregoing Judgment Granting Permanent Injunction was mailed to the defendant, Frank Lifang, at 650 North Atlantis Drive, Orem, Utah 84057, by placing the same in the United States mails, postage prepaid.

H. Mifflin Williams III